

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOY H. SIMS,)	
)	No. CV-07-0362-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on May 27, 2008. (Ct. Rec. 10, 15). Attorney Gary R. Penar represents Plaintiff Joy H. Sims ("Plaintiff"); Special Assistant United States Attorney Kathryn Ann Miller represents the Commissioner of Social Security ("Commissioner"). The parties have filed a consent to proceed before a magistrate judge. (Ct. Rec. 4). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 15) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 10).

JURISDICTION

On May 26, 2005, Plaintiff filed a an application for Disability Insurance Benefits ("DIB") and an application for Supplemental Security Income ("SSI") benefits, alleging disability since March 6, 2005. (AR 16, 342). Plaintiff's applications were

1 denied initially and on reconsideration. An administrative
2 hearing was held before Administrative Law Judge ("ALJ") Paul L.
3 Gaughen on April 12, 2007. (AR 366-386). On May 23, 2007, the
4 ALJ issued a decision finding that Plaintiff was not disabled.
5 (AR 16-25). On September 17, 2007, the Appeals Council denied
6 Plaintiff's request for review. (AR 5-8). Therefore, the ALJ's
7 decision became the final decision of the Commissioner, which is
8 appealable to the district court pursuant to 42 U.S.C. § 405(g).
9 Plaintiff filed an action for judicial review pursuant to 42
10 U.S.C. § 405(g) on November 9, 2007. (Ct. Rec. 1).

11 STATEMENT OF FACTS

12 The facts have been presented in the administrative hearing
13 transcript, the ALJ's decision, the briefs of both Plaintiff and
14 the Commissioner and will only be summarized here. Plaintiff was
15 42 years old on the date of the ALJ's decision. (AR 25, 370).
16 Plaintiff is a high school graduate and has past work as a
17 cosmetologist, a daycare worker, a cleaner/housekeeper, a garment
18 sorter, a billing clerk, a telemarketer, and a quality control
19 supervisor. (AR 370, 377-378). Plaintiff alleges disability as
20 of March 6, 2005, due to chronic low back pain and blindness in
21 her left eye.¹ (AR 370-371).

22 She testified that she could sit for about 15 minutes before
23 pain required her to get up and move, stand in one spot for about
24 10 minutes before her back began to hurt, walk about one block,
25 and occasionally lift about 10 pounds. (AR 371-372). She stated
26

27 ¹At the administrative hearing, it was observed that, with
28 respect to her alleged blindness in her left eye, the only
restriction on Plaintiff's driver's license is that she must
wear corrective lenses. (AR 376-377).

1 that she experiences right leg numbness about four times a week
2 and that this sensation catches her off guard and causes her to
3 fall about three times a month. (AR 372-373). She also indicated
4 that she has difficulty sleeping and wakes up about three times a
5 week due to back pain. (AR 374). Plaintiff testified that, for
6 pain relief, she would lay on the floor and stretch about four
7 times per day for about five to six minutes at a time. (AR 384-
8 385).

9 SEQUENTIAL EVALUATION PROCESS

10 The Social Security Act (the "Act") defines "disability" as
11 the "inability to engage in any substantial gainful activity by
12 reason of any medically determinable physical or mental impairment
13 which can be expected to result in death or which has lasted or
14 can be expected to last for a continuous period of not less than
15 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
16 Act also provides that a Plaintiff shall be determined to be under
17 a disability only if his impairments are of such severity that
18 Plaintiff is not only unable to do his previous work but cannot,
19 considering Plaintiff's age, education and work experiences,
20 engage in any other substantial gainful work which exists in the
21 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
22 Thus, the definition of disability consists of both medical and
23 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
24 (9th Cir. 2001).

25 The Commissioner has established a five-step sequential
26 evaluation process for determining whether a person is disabled.
27 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
28 engaged in substantial gainful activities. If he is, benefits are

1 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
2 decision maker proceeds to step two, which determines whether
3 Plaintiff has a medically severe impairment or combination of
4 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

5 If Plaintiff does not have a severe impairment or combination
6 of impairments, the disability claim is denied. If the impairment
7 is severe, the evaluation proceeds to the third step, which
8 compares Plaintiff's impairment with a number of listed
9 impairments acknowledged by the Commissioner to be so severe as to
10 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
11 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
12 meets or equals one of the listed impairments, Plaintiff is
13 conclusively presumed to be disabled. If the impairment is not
14 one conclusively presumed to be disabling, the evaluation proceeds
15 to the fourth step, which determines whether the impairment
16 prevents Plaintiff from performing work he has performed in the
17 past. If Plaintiff is able to perform his previous work, he is
18 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
19 cannot perform this work, the fifth and final step in the process
20 determines whether Plaintiff is able to perform other work in the
21 national economy in view of his residual functional capacity and
22 his age, education and past work experience. 20 C.F.R. §§
23 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

24 The initial burden of proof rests upon Plaintiff to establish
25 a *prima facie* case of entitlement to disability benefits.
26 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
27 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
28 met once Plaintiff establishes that a physical or mental

1 impairment prevents him from engaging in his previous occupation.
2 The burden then shifts to the Commissioner to show (1) that
3 Plaintiff can perform other substantial gainful activity and (2)
4 that a "significant number of jobs exist in the national economy"
5 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
6 (9th Cir. 1984).

7 STANDARD OF REVIEW

8 Congress has provided a limited scope of judicial review of a
9 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
10 the Commissioner's decision, made through an ALJ, when the
11 determination is not based on legal error and is supported by
12 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
13 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
14 1999). "The [Commissioner's] determination that a plaintiff is
15 not disabled will be upheld if the findings of fact are supported
16 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
17 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
18 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
19 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
20 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
21 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
22 573, 576 (9th Cir. 1988). Substantial evidence "means such
23 evidence as a reasonable mind might accept as adequate to support
24 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
25 (citations omitted). "[S]uch inferences and conclusions as the
26 [Commissioner] may reasonably draw from the evidence" will also be
27 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
28 On review, the court considers the record as a whole, not just the

1 evidence supporting the decision of the Commissioner. *Weetman v.*
2 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
3 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

4 It is the role of the trier of fact, not this court, to
5 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
6 evidence supports more than one rational interpretation, the court
7 may not substitute its judgment for that of the Commissioner.
8 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
9 (9th Cir. 1984). Nevertheless, a decision supported by
10 substantial evidence will still be set aside if the proper legal
11 standards were not applied in weighing the evidence and making the
12 decision. *Browner v. Secretary of Health and Human Services*, 839
13 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
14 evidence to support the administrative findings, or if there is
15 conflicting evidence that will support a finding of either
16 disability or nondisability, the finding of the Commissioner is
17 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
18 1987).

19 ALJ'S FINDINGS

20 The ALJ found at step one that Plaintiff has not engaged in
21 substantial gainful activity since her alleged onset date. (AR
22 18). At step two, the ALJ determined that Plaintiff had the
23 severe impairments of obesity; severe musculoskeletal impairment
24 to the back, bilateral spondylolysis at L5 with Grade I
25 anterolisthesis of L5 on C1; and severe impairment to the left eye
26 sufficient to produce minor visual limitations but no blindness.

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1 (AR 18). The ALJ noted that while Plaintiff had complained of
2 anxiety, depression and stress and was receiving medication for
3 these symptoms, once Plaintiff began the medications she reported
4 improved functioning. (AR 21). The ALJ concluded that these
5 complaints did not pose more than minimal limitations on her
6 ability to perform basic work-related activities and, therefore,
7 did not constitute severe impairments. (AR 21). The ALJ
8 determined that Plaintiff did not have an impairment or
9 combination of impairments listed in or medically equal to one of
10 the Listings impairments. (AR 21).

11 After considering the record, the ALJ found that Plaintiff
12 had the residual functional capacity ("RFC") to perform sedentary
13 work exertion with lifting and carrying 10 pounds both
14 occasionally and frequently, standing and walking at least two
15 hours in an eight hour workday and sitting for six hours in an
16 eight hour workday and was capable of occasional climbing (ramps,
17 stairs, ladders, ropes, scaffolds), kneeling, crouching, crawling
18 and stooping. (AR 21). At step four of the sequential evaluation
19 process, the ALJ determined that, consistent with the opinions of
20 the vocational expert and in comparing Plaintiff's RFC with the
21 physical and mental demands of her past relevant work, Plaintiff
22 was able to perform her past relevant work as a garment sorter, a
23 billing clerk and a telephone solicitor. (AR 24-25).
24 Accordingly, the ALJ determined, at step four of the sequential
25 evaluation process, that Plaintiff was not disabled within the
26 meaning of the Social Security Act. (AR 25).

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ISSUES

Plaintiff contends that the Commissioner erred as a matter of law. Specifically, she argues that:

1. The ALJ erred by relying on the opinions of A. Peter Weir, M.D., and the opinions of the state agency reviewing physicians;

2. The ALJ erred by failing to develop the record with regard to Plaintiff's mental abilities and limitations;

3. The ALJ erred by finding Plaintiff's testimony to be not entirely credible;

4. The ALJ's RFC determination was erroneous; and

5. The ALJ erred by failing to conduct an adequate step four analysis.

This Court must uphold the Commissioner's determination that Plaintiff is not disabled if the Commissioner applied the proper legal standards and there is substantial evidence in the record as a whole to support the decision.

DISCUSSION**I. Plaintiff's Credibility**

Plaintiff argues that the ALJ erred by improperly rejecting Plaintiff's testimony without giving adequate reasons. (Ct. Rec. 11 at 18-23). The undersigned does not agree.

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once Plaintiff produces medical evidence of an underlying impairment, the ALJ may not discredit Plaintiff's testimony as to

1 the severity of an impairment because it is unsupported by medical
2 evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
3 (citation omitted). Absent affirmative evidence of malingering,
4 the ALJ's reasons for rejecting Plaintiff's testimony must be
5 "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
6 Cir. 1995). "General findings are insufficient: rather the ALJ
7 must identify what testimony is not credible and what evidence
8 undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
9 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). The ALJ may
10 consider at least the following factors when weighing Plaintiff's
11 credibility: Plaintiff's reputation for truthfulness,
12 inconsistencies either in her testimony or between her testimony
13 and her conduct, Plaintiff's daily activities, Plaintiff's work
14 record, and testimony from physicians and third parties concerning
15 the nature, severity, and effect of the symptoms of which she
16 complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
17 2002). If the ALJ's credibility finding is supported by
18 substantial evidence in the record, the court must not engage in
19 second-guessing. *Id.* at 959.

20 The ALJ considered the evidence of record and concluded that
21 Plaintiff's medically determinable impairments could reasonably be
22 expected to produce the alleged symptoms, but that Plaintiff's
23 statements concerning the intensity, persistence and limiting
24 effects of these symptoms were not entirely credible. (AR 23).
25 The ALJ discussed the evidence of record and determined that
26 Plaintiff's testimony was not fully credible. (AR 22-24).

27 The ALJ indicated that, inconsistent with Plaintiff's
28 testimony that she is blind in her left eye, records from her

1 treating optometrist did not show any complaints of left eye
2 blindness and she was only treated for dry eye syndrome with the
3 administration of punctal plugs. (AR 23, 265). Dr. Weir noted
4 only a small cataract in Plaintiff's left eye but nothing to
5 support complete blindness. (AR 23, 330). Moreover, as indicated
6 in footnote one, above, it was observed at the administrative
7 hearing that the only restriction on Plaintiff's driver's license
8 is that she must wear corrective lenses. (AR 376-377).

9 Therefore, Plaintiff's statements that she is blind in her left
10 eye are not consistent with the record evidence.

11 The ALJ also indicates that Plaintiff failed to pursue
12 physical therapy that was offered to her. (AR 23). Noncompliance
13 with medical care or unexplained or inadequately explained reasons
14 for failing to seek medical treatment cast doubt on a claimant's
15 subjective complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v.*
16 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Plaintiff apparently
17 did not follow through with the prescribed physical therapy due to
18 a reported death in the family. (AR 184).

19 The ALJ additionally references Plaintiff's activities of
20 daily living. (AR 23). It is well-established that the nature of
21 daily activities may be considered when evaluating credibility.
22 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). The ALJ
23 indicated that, inconsistent with Plaintiff's allegations of
24 significant pain, Plaintiff reported "power walking" (AR 223) and
25 had volunteered to help moms have babies (AR 319). (AR 23).

26 The ALJ further references Plaintiff's report that her back
27 was doing well with the current treatment, she had good pain
28 control and she had decreased pain and medications were working

1 well. (AR 23-24, 282-285). The effectiveness of medication in
2 alleviating pain and other symptoms is a relevant factor to
3 consider in evaluating the severity of a claimant's symptoms. 20
4 C.F.R. § 416.929(c)(3). The ALJ further noted that treatment had
5 been essentially routine and/or conservative in nature. (AR 24).
6 Conservative or minimal treatment during the relevant time period
7 may suggest a lower level of pain and functional limitation.
8 *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995).

9 The ALJ also indicated that Plaintiff's treating and
10 consulting medical professionals did not support her allegations
11 that she is unable to perform any work activities. (AR 24). A
12 lack of supporting objective medical evidence is a factor which
13 may be considered in evaluating an individual's credibility,
14 provided that it is not the sole factor. *Bunnell v. Sullivan*, 347
15 F.2d 341, 345 (9th Cir. 1991). The ALJ indicated that Plaintiff's
16 treating clinician was of the opinion that she was capable of
17 sedentary work exertion which was consistent with the findings of
18 Dr. Weir. (AR 24, 323). Furthermore, reviewing state agency
19 physicians additionally did not find that Plaintiff was incapable
20 of performing work. (AR 166-173, 185-192, 238-245). Thus, the
21 objective medical evidence of record also does not support
22 Plaintiff's allegations of disabling pain and symptoms.

23 After reviewing the record, the undersigned finds that the
24 reasons provided by the ALJ for finding Plaintiff not fully
25 credible, as outlined above, are clear and convincing and
26 supported by substantial evidence in the record. Accordingly, the
27 ALJ did not err by concluding that Plaintiff's testimony was not
28 entirely credible in this case.

1 **II. Develop the Record**

2 Plaintiff contends that the ALJ erred by failing to further
3 develop the record with respect to Plaintiff's mental abilities
4 and limitations. (Ct. Rec. 11 at 16-18). Plaintiff asserts that
5 the ALJ failed to recognize Plaintiff's depression as a severe
6 impairment. (Ct. Rec. 11 at 16-18).

7 Plaintiff has the burden of proving that she has a severe
8 impairment at step two of the sequential evaluation process. 42
9 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 423(d)(1)(A), 416.912. In
10 order to meet this burden, Plaintiff must furnish medical and
11 other evidence that shows that she has a severe impairment. 20
12 C.F.R. § 416.912(a). The regulations, 20 C.F.R. §§ 404.1520(c),
13 416.920(c), provide that an impairment is severe if it
14 significantly limits one's ability to perform basic work
15 activities. An impairment is considered non-severe if it "does
16 not significantly limit your physical or mental ability to do
17 basic work activities." 20 C.F.R. §§ 404.1521, 416.921.

18 Step two is "a de minimis screening device [used] to dispose
19 of groundless claims," *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th
20 Cir. 1996), and an ALJ may find that a claimant lacks a medically
21 severe impairment or combination of impairments only when this
22 conclusion is "clearly established by medical evidence." S.S.R.
23 85-28; see *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir.
24 2005). Applying the normal standard of review to the requirements
25 of step two, the Court must determine whether the ALJ had
26 substantial evidence to find that the medical evidence clearly
27 established that Plaintiff did not have a medically severe mental
28 impairment. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)

1 ("Despite the deference usually accorded to the Secretary's
2 application of regulations, numerous appellate courts have imposed
3 a narrow construction upon the severity regulation applied
4 here."); *Webb*, 433 F.3d at 687.

5 The ALJ noted that while Plaintiff had complained of anxiety,
6 depression and stress to her treating clinician and was receiving
7 medication for those symptoms (AR 295-298), she reported better
8 mood and decreased symptoms once she began taking medication. (AR
9 21). The ALJ indicated that Plaintiff's complaints were sporadic
10 and appeared to be situational and that she did not seek any
11 professional treatment or psychiatric care. (AR 21). The ALJ
12 therefore concluded that Plaintiff's mental health complaints did
13 not generate more than minimal limitations on her ability to
14 perform basic work-related activities and she thus did not have a
15 severe mental impairment. (AR 21).

16 It was Plaintiff's duty to prove that she had a severe mental
17 impairment. 20 C.F.R. § 404.1512(c) ("You must provide medical
18 evidence showing that you have impairment(s) and how severe it is
19 during the time you say you are disabled"). Plaintiff failed to
20 provide the ALJ with medical evidence which demonstrated that her
21 mental health complaints were severe impairments. In fact,
22 Plaintiff's disability report in the record, as well as her
23 testimony at the administrative hearing, make no mention of mental
24 impairments as a part of her disability claim. (AR 79-88, 370-
25 377). Moreover, Plaintiff can only now direct the Court to
26 "references" in the record of depression with a prescription for
27 Effexor. (Ct. Rec. 11 at 16). There are simply no medical
28 reports of record indicating that Plaintiff's mental ability to do

1 basic work activities is significantly limited. Therefore, the
2 evidence of record does not support a finding that Plaintiff has a
3 severe mental impairment.

4 With regard to the ALJ's duty to develop the record, the ALJ
5 has an affirmative duty to supplement Plaintiff's medical record,
6 to the extent it is incomplete, before rejecting her claim of a
7 severe impairment. See 20 C.F.R. § 404.1512(e)(1); S.S.R. 96-5p
8 (1996); *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) ("In
9 Social Security cases the ALJ has a special duty to fully and
10 fairly develop the record and to assure that the claimant's
11 interests are considered.") The ALJ's duty to supplement
12 Plaintiff's record is triggered by ambiguous evidence. *Tonapetyan*
13 *v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). The record before
14 the ALJ was neither ambiguous nor inadequate to allow for proper
15 evaluation of the evidence.

16 As noted by the Commissioner, the record exhibits Plaintiff's
17 sporadic and situational complaints of depression which resolved
18 with treatment in less than 12 months. (Ct. Rec. 16 at 15). The
19 medical evidence of record shows the absence of any credible
20 evidence supporting Plaintiff's claim of severe depression.
21 Accordingly, the undersigned finds that the ALJ did not err with
22 respect to his evaluation of Plaintiff's mental abilities and
23 limitations in this case.

24 **III. RFC Determination**

25 Plaintiff asserts that the ALJ's RFC determination is not
26 supported by substantial evidence and constitutes an error of law
27 based upon the failure to consider and properly assess all of the
28 medical evidence and Plaintiff's limitations. (Ct. Rec. 11 at 23-

26). Plaintiff separately argues that the ALJ erred by adopting the opinions of Dr. Weir and the state agency reviewing physicians. (Ct. Rec. 11 at 13-15).

RFC is defined as the most one can still do despite the individual's limitations. 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). In making his RFC determination, the ALJ considers Plaintiff's symptoms, including pain, and the extent to which these symptoms can be reasonably accepted as consistent with the objective medical evidence and other evidence of record. The ALJ also considers the opinions of acceptable medical sources which reflect the judgment about the nature and severity of the impairments and resulting limitations.

Plaintiff was referred to A. Peter Weir, M.D., on March 13, 2007, for a physical consultative examination. (AR 328-337). Plaintiff's chief complaints were low back pain, blindness in her left eye and obesity. (AR 328). Dr. Weir noted that x-rays of the lumbar spine performed on February 2, 2005, showed "bilateral spondylosis at L5 with grade 1 anterolisthesis of L5 on S1" and an MRI of the lumbar spine performed on April 27, 2005, showed "spondylosis at L5 with mild anterolisthesis of L5 on S1." (AR 328). With respect to her left eye, Dr. Weir noted that Plaintiff was treated with photodynamic laser therapy to the retina. (AR 328-329). While Plaintiff stated that her vision was not improved by the laser therapy and that she is now blind in the left eye, Dr. Weir indicated that medical notes revealed her corrected vision following the laser therapy was 20/30 in both eyes. (AR 329).

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1 Dr. Weir diagnosed chronic low back pain as a result of
2 bilateral spondylosis at L5 with grade 1 anterolisthesis of L5 on
3 S1, impaired vision in the left eye and obesity. (AR 332). He
4 noted that Plaintiff has a small cataract which could produce
5 minor impairment in vision but not total blindness as alleged.
6 (AR 332). Dr. Weir opined that Plaintiff is limited by low back
7 pain which is aggravated by obesity and that she is capable of
8 standing and/or walking for two hours in an eight-hour day, with
9 frequent breaks, and sitting for six hours in an eight-hour day
10 with breaks every two hours. (AR 332). Dr. Weir determined that
11 Plaintiff did not require an assistive device for ambulation, had
12 no manipulative or environmental restrictions, could lift and/or
13 carry 10 pounds occasionally and 10 pounds frequently, and was
14 limited by the presence of low back pain to only occasional
15 bending, stooping, crouching, climbing, kneeling and crawling.
16 (AR 332-333).

17 The ALJ gave weight to the Dr. Weir's opinions, indicating
18 that he had the opportunity to review all of the record evidence
19 (AR 24) and concluded that Plaintiff had the RFC to perform
20 sedentary exertion level work with lifting and carrying 10 pounds
21 both occasionally and frequently, standing and walking at least
22 two hours in an eight hour workday and sitting for six hours in an
23 eight hour workday and was capable of occasional climbing (ramps,
24 stairs, ladders, ropes, scaffolds), kneeling, crouching, crawling
25 and stooping (AR 21).

26 Dr. Weir's opinions are not contradicted by any other
27 credible evidence of record. As indicated by the ALJ, the RFC
28 conclusions of the state agency reviewing physicians support a

1 finding of "not disabled" (AR 24) and are consistent with Dr.
2 Weir's conclusions (AR 166-173, 185-192, 238-245). Furthermore,
3 as noted in the ALJ's decision, Plaintiff's treating clinician at
4 the Doctors Clinic of Spokane, Ms. Abney, ARNP, opined on August
5 4, 2005, that Plaintiff was limited to sedentary work with no
6 lifting more than 20 pounds and was capable of working full time
7 with frequent position changes. (AR 20, 323). In January 2006,
8 Plaintiff reported to her treating physician that she was doing
9 well with her current treatment for her back and that the
10 medication was working. (AR 282). In February 2006, Plaintiff
11 reported increased walking and had good to fair pain control. (AR
12 284). The record further reveals that Plaintiff reported "power
13 walking" (AR 223) and volunteer help with moms have babies (AR
14 319). These statements and opinions are consistent with the state
15 agency reviewers' opinions (AR 166-173, 185-192, 238-245) and Dr.
16 Weir's March 13, 2007 evaluation opinions (AR 328-337).

17 Plaintiff also argues that the ALJ mischaracterized the
18 record because Dr. Weir did not review a later MRI, from March
19 2007, which was performed two days after Dr. Weir's report. (Ct.
20 Rec. 11 at 14). This MRI, which showed moderate to severe
21 degenerative disc disease at L5-S1, worse than previously
22 indicated (AR 339), was brought to the ALJ's attention at the time
23 of the administrative hearing (AR 378-380). Nevertheless, the ALJ
24 indicated that he fully considered those findings, in addition to
25 all other evidence of record, and took the findings into account
26 when making his ultimate RFC determination. (AR 24). The ALJ
27 indicated that the imaging in question did not limit Plaintiff any
28 greater than as he determined in his RFC finding. (AR 24). It is

1 clear that the ALJ considered the MRI findings and properly
2 weighed those findings in evaluating the medical evidence.

3 Plaintiff also asserts that the ALJ erred by not considering
4 all of Plaintiff's impairments in the RFC assessment, including
5 limitations from headaches, depression, vision deficits,
6 limitations from obesity and drowsiness from medications. (Ct.
7 Rec. 11 at 23-26). The ALJ appropriately did not include
8 restrictions as a result of headaches and medication side-effects
9 because limitations from those alleged impairments are not
10 supported by the weight of the record evidence. With respect to
11 depression, as indicated above, the record demonstrates that
12 Plaintiff's sporadic and situational complaints of depression
13 resolved with treatment. *Supra*. Finally, it is apparent that the
14 ALJ did, in fact, consider vision deficits and Plaintiff's obesity
15 in formulating his determination. The ALJ indicated that
16 Plaintiff's obesity and minor visual limitations to her left eye
17 were severe impairments. (AR 18). However, complaints of greater
18 limitations than those assessed by the ALJ were properly found not
19 entirely credible by the ALJ. *Supra*. The ALJ's RFC determination
20 adequately accounts for Plaintiff's severe obesity and vision
21 deficits. (AR 21).

22 Lastly, Plaintiff contends that her need for "frequent
23 breaks" was not addressed by the ALJ. (Ct. Rec. 11 at 14). While
24 the narrative portion of Dr. Weir's report indicates that
25 Plaintiff is capable of standing and/or walking for two hours in
26 an eight-hour workday with "frequent breaks" (AR 332), Dr. Weir
27 does not define "frequent", indicates that Plaintiff is able to
28 sit for six hours a day with breaks every two hours, and makes no

1 reference to "frequent breaks" in his medical source statement.
2 (AR 332, 334-337). The ALJ relied on the weight of the evidence
3 of record, including Dr. Weir's report, to find that Plaintiff
4 could perform sedentary exertion work. Sedentary work is defined
5 as one which involves sitting, although a certain amount of
6 walking and standing is often necessary to carry out the job
7 duties. C.F.R. § 404.1567(a). Jobs are sedentary if walking and
8 standing are required occasionally and other sedentary criteria
9 are met. *Id.* The ALJ does not mention "frequent breaks" from
10 standing/walking in his decision; however, his RFC finding
11 indicates standing and walking for two hours and sitting for six
12 hours. (AR 21). Undefined "breaks" from the standing/walking
13 duties of a job could consist of job duties being performed while
14 sitting, a break from standing/walking. Alternatively, the ALJ
15 may have interpreted the medical evidence as not requiring
16 frequent breaks, consistent with Dr. Weir's medical source
17 statement findings. (AR 334-337). It is notable that the ALJ's
18 third hypothetical to the vocational expert contemplated a job
19 necessity of a sit-stand option. (AR 382). In any event, it is
20 the responsibility of the ALJ to resolve conflicts in medical
21 testimony and resolve ambiguities. *Saelee v. Chater*, 94 F.3d 520,
22 522 (9th Cir. 1996). The Court thus has a limited role in
23 determining whether the ALJ's decision is supported by substantial
24 evidence and may not substitute its own judgment for that of the
25 ALJ even if it might justifiably have reached a different result
26 upon de novo review. 42 U.S.C. § 405(g). The ALJ's RFC
27 determination is properly supported.

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1 Contrary to Plaintiff's arguments, the record does not
2 support a more restrictive RFC determination than as assessed by
3 the ALJ in this matter. The ALJ's reliance on Dr. Weir's
4 findings, as consistent with the credible evidence of record, was
5 proper in this case. The ALJ's RFC finding is supported by
6 substantial record evidence and free of error.

7 **IV. Step Four Determination**

8 Plaintiff contends that the ALJ's step four analysis is
9 unsupported by the evidence and contrary to law. (Ct. Rec. 11 at
10 26-28). Social Security Ruling ("SSR") 82-61 provides that,
11 pursuant to 20 C.F.R. § 404.1520(e) and § 416.920(e), a claimant
12 will be found not disabled when it is determined she retains the
13 RFC to perform either the actual functional demands and job duties
14 of a particular past relevant job, or the functional demands and
15 job duties of the occupation as generally required by employers
16 throughout the national economy. SSR 82-61. "If a claimant shows
17 that he or she cannot return to his or her previous job, the
18 burden of proof shifts to the Secretary to show that the claimant
19 can do other kinds of work." *Embrey v. Bowen*, 849 F.2d 418, 422
20 (9th Cir. 1988). Plaintiff thus has the initial burden of
21 demonstrating she cannot perform her past relevant work. *Hoffman*
22 *v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986). Only after
23 Plaintiff establishes her inability to perform her previous work
24 does the burden shift to the Commissioner to show that Plaintiff
25 can do less demanding substantial gainful work which exists in the
26 national economy. *Hoffman*, 785 F.2d at 1425.

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28 ///

1 Regarding the findings that must be made at step four, SSR
2 82-62 provides:

3 In finding that an individual has the capacity to perform a
4 past relevant job, the determination or decision must contain
among the findings the following specific findings of fact:
5 (1) A finding of fact as to the individual's residual
functional capacity (RFC); (2) A finding of fact as to the
6 physical and mental demands of the past job/occupation;
(3) A finding of fact that the individual's RFC would permit
a return to his or her past job or occupation.

7
8 SSR 82-62.

9 As determined above, the ALJ's RFC finding was proper in this
10 case. *See supra*. Accordingly, the ALJ appropriately concluded
that Plaintiff was capable of performing sedentary exertion work.

11 Vocational expert Daniel R. McKinney testified that
12 Plaintiff's past work as a billing clerk was sedentary exertion
13 level work, her past work as a telemarketer, quality control
14 supervisor, was light work, and her past work as a garment sorter
15 was light work but could be performed at the sedentary exertion
16 level. (AR 377-378, 382). Based on a hypothetical which included
17 the limitations assessed by the ALJ in this case, the vocational
18 expert testified that the individual would be capable of
19 performing Plaintiff's past relevant work as a garment sorter,
20 billing clerk and telephone solicitor, quality control supervisor.
21 (AR 381-383). Mr. McKinney indicated that while the billing clerk
22 job was the only job classified as sedentary work, a person could
23 also work as a garment sorter at the sedentary level. (AR 382).
24 At step four of the sequential evaluation process, the ALJ found
25 that, based on Plaintiff's RFC and the vocational expert's
26 testimony, Plaintiff was capable of performing her past relevant
27 work as a garment sorter, billing clerk and telephone solicitor.
28 (AR 25).

1 Consistent with the Vocational Expert's testimony, the ALJ
2 made a finding that Plaintiff's past relevant work as a billing
3 clerk was sedentary and her past work as a garment sorter was
4 light work but that it could be performed at the sedentary
5 exertion level. (AR 25, 382). The ALJ additionally found that
6 Plaintiff's testimony and the vocational expert's testimony
7 demonstrates that Plaintiff's work as a telephone solicitor, as
8 performed, required no more than sedentary exertion. (AR 25).
9 The ALJ properly compared Plaintiff's RFC with the demands of her
10 past work and concluded that Plaintiff would be able to perform
11 the jobs as actually and generally performed. (AR 25). The ALJ's
12 step four findings were consistent with the directives of SSR 82-
13 62. Plaintiff failed in her initial burden of proving she cannot
14 perform any of her past relevant work. *Hoffman*, 785 F.2d at 1425.
15 The undersigned finds that the ALJ's step four determination was
16 without error.

17 **V. Sustained Work Activity**

18 Plaintiff asserts that the ALJ's decision is flawed because
19 he failed to assess whether Plaintiff is capable of working on a
20 "regular and continuing basis" for eight hours a day, five days a
21 week. (Ct. Rec. 11 at 23-26). However, as noted by the
22 Commissioner, an ALJ need not recite certain "magic words" in his
23 decision, so long as a reviewing court can draw specific and
24 legitimate inference from his findings. *Magallanes v. Bowen*, 881
25 F.2d 747, 755 (9th Cir. 1989); (Ct. Rec. 16 at 21). As discussed
26 above, a claimant will be found not disabled when it is determined
27 that she retains the RFC to perform either the actual functional
28 demands and job duties of a particular past relevant job, or the

1 functional demands and job duties of the occupation as generally
2 required by employers throughout the national economy. SSR 82-61.
3 The vocational expert's testimony, based on a proper RFC
4 assessment (*supra*), demonstrated that Plaintiff is capable of
5 performing her past relevant work. It is logical to assume that
6 if the ALJ's RFC determination, a finding intended to describe the
7 most an individual can still do despite her limitations, precluded
8 sustained work, the vocational expert would have attested to the
9 same. The substantial weight of the record evidence supports the
10 ALJ's conclusion that Plaintiff retains the ability to perform her
11 past relevant work on a sustained basis.

12 **CONCLUSION**

13 Having reviewed the record and the ALJ's conclusions, the
14 Court finds that the ALJ's decision is supported by substantial
15 evidence and free of legal error. Plaintiff is thus not disabled
16 within the meaning of the Social Security Act. Accordingly,

17 **IT IS ORDERED:**

18 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 10**)
19 is **DENIED**.

20 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**)
21 is **GRANTED**.

22 3. The District Court Executive is directed to enter
23 judgment in favor of Defendant, file this Order, provide a copy to
24 counsel for Plaintiff and Defendant, and **CLOSE** this file.

25 **IT IS SO ORDERED.**

26 **DATED** this 6th day of June, 2008.

27 S/James P. Hutton

28 JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE